

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE

ANNUAL REPORT

FISCAL YEAR 2002



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ADVISORY COMMITTEE MEMBERS

Honorable Harold D. Clarke (ret.), Chair

Mr. Russell M. Aoki

Representative Luke Esser

Senator Mary Margaret Haugen

Mr. Mel Jackson

Representative Ruth Kagi

Representative Kathy Lambert

Senator Jeanine Long

Ms. Mary McQueen

Mr. Andy Pascua

Ms. Catherine Smith

Senator Val Stevens

Honorable Philip J. Thompson (ret.)

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MISSION STATEMENT

The mission of Washington State Office of Public Defense (OPD) is to "implement the constitutional guarantee of counsel and to ensure the effective and efficient delivery of indigent appellate services funded by the state of Washington," RCW 2.70.005.

OVERVIEW

Washington State Office of Public Defense is an independent judicial branch agency. Created by the Legislature in 1996, the agency coordinates with the Supreme Court and the three divisions of the Court of Appeals to ensure high quality representation through study and actions including:

- implementing procedures for appointment and evaluation of attorney services;
- administering funds appropriated for court-appointed counsel in appellate cases;
- initiating legislative proposals and court rule changes;
- supporting the appellate cost recovery system through timely responses to requests;
- reporting and recommending indigency criteria and standards; and
- providing information, special reports and recommendations to the Legislature, as required, including an annual prioritized list of aggravated murder costs submitted by county prosecutors.

ADVISORY COMMITTEE

The Office of Public Defense Advisory Committee oversees the agency, as prescribed by statute.

The members of the Office of Public Defense Advisory Committee represent a wide spectrum of interests of persons concerned with public defense issues. The Committee includes three persons appointed by the Chief Justice of the Washington State Supreme Court, including the Chair; two persons appointed by the Governor; two state senators; two members of the House of Representatives; one person appointed by the Court of Appeals Executive Committee; and one person appointed by the Washington State Bar Association.

The Committee members for fiscal year 2002 were The Honorable Harold D. Clarke, Chair, Spokane County Superior Court Judge (ret.); Russell M. Aoki, Attorney at Law; Mary McQueen, Washington State Court Administrator; Andy Pascua, Yakima County Department of Community Services; Mel Jackson, Millionair Club Charity (resigned mid-

term and was not replaced during fiscal year 2002); The Honorable Mary Margaret Haugen, State Senator, 10th District; The Honorable Jeanine Long, State Senator, 44th District (replaced mid-year by Senator Val Stevens); The Honorable Val Stevens, State Senator, 39th District; The Honorable Luke Esser, State Representative, 48th District; The Honorable Kathy Lambert, State Representative, 45th District (replaced mid-year by Representative Luke Esser); The Honorable Ruth Kagi, State Representative, 32nd District; Catherine Smith, Attorney at Law.

During fiscal year 2002, the Advisory Committee conducted business at quarterly meetings and met additionally as necessary to consider time-sensitive issues. The Advisory Committee reviewed legislative and court rule proposals, established agency policies and procedures, provided oversight of the budget and of agency programs, and resolved fiscal appeals pursuant to court rules.

AGENCY STRUCTURE

A small, efficient staff manages the day-to-day business of Washington State OPD.

The agency staff is composed of a director, a deputy director, a budget analyst, a senior financial analyst, an executive assistant, and an administrative assistant. The budget analyst analyzes the budget and processes invoices. The senior financial analyst processes invoices for indigent appellate defense services. They both also respond to inquiries regarding billing procedures and allowable claims. The executive assistant responds to inquiries related to cost-recoupment and manages office and document preparation matters, and the administrative assistant provides support and technical expertise. The director and deputy director manage the budget and carry out the tasks described below.

AGENCY TASKS AND ACCOMPLISHMENTS IN FY 2002

Washington State OPD efficiently administered state funds appropriated for indigent appellate representation and other agency operations in FY 2002.

Both the federal and state constitutions as well as state statutes guarantee the right to appeal a variety of superior court decisions, including criminal convictions, dependency orders, parental rights terminations, criminal contempt convictions, and involuntary civil commitments. Indigent parties involved in these cases, in which their fundamental interests are at risk, are entitled to representation at state expense. In addition to appeals as a matter

of right, indigent defendants are entitled to court-appointed representation for responses to state appeals, motions for discretionary review and petitions for review that have been accepted by an appellate court, personal restraint petitions in death penalty cases, and non-death penalty personal restraint petitions that the court has determined are not frivolous.

When an indigent defendant files an appeal as a matter of right, the trial court determines indigency. If the facts warrant an order of indigency, the court appoints an attorney and authorizes payment of specified case costs. The parties designate relevant material from the clerk's file and the trial court proceedings for the appellate court to review. The court clerk and court reporter prepare these documents, called the clerk's papers and the verbatim report of proceedings, for use during the appeal by the appellate court and the prosecuting and defense attorneys. In performing publicly funded indigent appellate representations, appointed attorneys review these documents, consult with the client, research the law, prepare and file briefs on the issues and applicable law, and deliver oral arguments in cases if so ordered by the appellate court.

Appellate attorneys, court reporters, county clerks, the appellate courts, and others who have worked on the case file invoices with Washington State OPD. The agency reviews each invoice and authorizes payment for the court-ordered services rendered, based on Washington State Court Rules and rates adopted by the Washington State OPD Advisory Committee. The agency denies payment if reimbursement is not authorized.

***The agency processed 13,030 invoices in fiscal year 2002:
Statistical Report***

During fiscal year 2002 Washington State OPD staff processed 13,030 invoices: 5,606 invoices from attorneys; 3,495 invoices for pro se transcripts and court reporters; 2,195 invoices from county clerks; and 1,734 invoices from appellate courts for photocopying briefs.

Payments of \$3,832,271 were disbursed for attorney services and payments of \$1,416,507 were disbursed for other services, for a total of \$5,248,778. Each invoice submitted is verified by reference to the Judicial Information System and the agency's database.

The agency initiated a Supreme Court Rule change to ensure effective representation at trial for defendants facing the death penalty.

Ineffective assistance of counsel is a major cause of inequities in the administration of justice for death penalty defendants. Ineffective assistance can result in the improper application of the death penalty and in reversal of death penalty convictions and sentences in the Supreme Court. The possibility of error and the expense of new trials serve neither the defendant's nor the state's interests. In the spring of 1998, the Supreme Court appointed the Capital Counsel Panel to review the qualifications of applicant death penalty attorneys and create a list of attorneys found to have the requisite skill levels for the three types of state death penalty cases: trials, appeals, and personal restraint petitions. However, trial judges were not required to appoint defense counsel from the list of death penalty-qualified attorneys.

At the request of Chief Justice Gerry Alexander, in the fall of 2001, OPD proposed a rule change to require that superior court judges with a death penalty case appoint two experienced trial counsel, at least one of whom has been determined to be adequately qualified by the Capital Counsel Panel. During the rule comment period, OPD worked with the Superior Court Judges' Association and the Capital Counsel Panel to refine the proposed procedure to assure the uniform appointment of highly qualified defense counsel for capital defendants.

The Supreme Court adopted changes to Superior Court Special Proceedings Rules Number 2 (SPRC 2). Under the new rule, neither appointed attorney is permitted to be presently serving as appointed counsel on another active death penalty case. In unusual circumstances where there is good cause, a trial court may appoint two qualified, but unlisted attorneys for special reasons, but the court must enter Findings of Fact to justify the decision. The effective date of the new rules is January 1, 2003.

The agency conducted a competitive procurement and contracted to establish the Death Penalty Assistance Center.

In accordance with a 2001 legislative directive to establish a Death Penalty Assistance Center, OPD conducted a competitive procurement and contracted with The Defender Association in Seattle to establish the DPAC to provide support and training to trial lawyers who represent defendants in death penalty cases. DPAC works through research and consultation to ensure quality capital trial-level representation in all areas of the state and particularly to alleviate the lack of death penalty-qualified attorneys in many of the state's less populated counties.

To address difficulties which trial courts face in appointing defense counsel during the critical early stages of an aggravated murder prosecution, DPAC has initiated a service to recruit nearby trial attorneys who have been death penalty-qualified in accordance with amended SPRC 2 and to refer their names for appointment by the trial judge in a particular case.

The agency enhanced the existing indigent appellate representation system in FY 2002.

Under Washington State Court Rules, the superior trial courts individually appoint counsel for appeals of non-death penalty cases, rather than the Courts of Appeal or another state institution. This has resulted in varying qualities of indigent appellate representation throughout the state. In 1999, OPD instituted a new contract system in Divisions II and III to implement uniformly high quality defense attorney representation standards in indigent appeals. In fiscal year 2002, OPD continued its efforts to monitor the quality of briefs. The agency convened panels of attorneys to review the briefs of fourteen attorneys with one-year contracts. The briefs were reviewed pursuant to criteria established at an indigent appellate contractor conference and by a Seattle University law professor. Based on the review, the OPD offered new contracts to four of the one-year attorneys. The agency also continued to oversee the work of 33 two-year contract attorneys, in addition to the work of the two contract firms in Division I.

To enhance the skills of contract attorneys, the OPD presented two continuing legal education programs in fiscal year 2002. “Writing an Effective Criminal Appellate Brief: From VRP to Finished Product” was presented in Spokane and Centralia in October 2001, and “Ineffective Assistance of Counsel” was presented in Olympia and Spokane in May 2002. These programs were made available to all OPD contract attorneys at no cost.

In fiscal year 2002, OPD continued use of the Rotating Appointment Roster process for recommending the appointment of death penalty defense counsel for Supreme Court cases. Counsel are recommended from the Capital Counsel Panel qualified list. This process provides an equitable distribution of capital cases among qualified counsel. Potential counsel are contacted and are advised as to the presumptive fee set for the case, which has been individually calculated by the agency in consultation with an out-of-state death penalty attorney. The Rotating Appointment Roster procedure allows qualified attorneys to better anticipate the availability of opportunities for appointment in these cases, and ensures that highly qualified list counsel can be timely appointed. During fiscal year 2002 the Rotating Appointment Roster process was used to timely recommend appointed counsel for two appellate level death penalty cases, State v. Woods and State v. Cross.

In total, during fiscal year 2002, the agency responded to approximately 1200 requests for information and assistance from courts, attorneys, defendants, and the public.

The agency supported the appellate cost recovery system through rapid responses to cost summary requests.

Under the Rules of Appellate Procedure, the appellate court determines the costs taxed to unsuccessful appellants. When an indigent defendant is unsuccessful on appeal, these costs become a part of the legal financial obligations that can be imposed by judgment. The rules require that a cost bill, prepared by the prosecuting attorney, be filed with the appellate court within ten days of the filing of an appellate decision terminating review. Prosecutors' offices forward requests for appellate case cost summaries to Washington State OPD. The agency responds within 24 hours in most cases. In FY 2002, Washington State OPD answered over 690 prosecutors' requests.

The agency reported on inmates' requests for DNA testing of evidence under the new DNA test statute.

In 2001, the Legislature voted to permit incarcerated persons who had been convicted of felonies and who had been denied postconviction DNA testing to petition the prosecutors for DNA testing. Petitions are permitted if DNA evidence was not admitted at trial because the court ruled DNA testing did not meet acceptable scientific standards or because DNA testing technology was not sufficiently developed at the time of the case.

As required by the statute, OPD prepared a report to the Legislature in December, 2001 detailing the effects of the statute, including the number of requests for testing, the number of denials, the number of appeals and the results of the tests. OPD worked with the Washington Association of Prosecuting Attorneys to survey prosecutors and also surveyed defense attorneys in each county, as well as attorneys who contract to provide legal services to inmates at state institutions. OPD reported that three postconviction DNA tests had been approved by prosecutors and two requests had been denied. The agency also reported uneven implementation by personnel in county evidence rooms of the statute's directive to retain biological evidence until 2005.

OPD recommended additional distribution of information about the DNA statute in prisons; comprehensive training for county evidence facilities personnel in retaining biological evidence; advice of appeals rights to inmates whose requests are denied by prosecutors; continued tracking of DNA testing requests; and possible extension of the act depending on procedures and evolving technologies.

The agency continued implementation of the Parents' Representation Pilot Program in Pierce and Benton-Franklin Juvenile Courts.

As a result of a 1999 Washington State OPD report entitled "Costs of Defense and Children's Representation in Dependency and Termination Cases," the 2000 Legislature directed Washington State OPD to establish an adequate defense representation pilot program during fiscal years 2001 and 2002. Benton-Franklin counties and Pierce County juvenile courts were selected as sites. Washington State OPD conducted a Request for Proposal process in Benton-Franklin counties in order to contract with additional attorneys, and contracted with Pierce County Department of Assigned Counsel to add attorneys, paralegals, and social workers to its dependency and termination unit staff. During the year, two pilot trainings were held in order to develop a new model for dependency and termination representation of parents. This representation model emphasizes communication with the parent clients, better preparation of cases, and oversight over the parent clients' ability to participate in services. The pilot attorneys employed investigative and expert services through appropriated funds made available for that purpose.

An independent evaluator firm has conducted two preliminary evaluations of the pilot program, one based on documentation from a three-month period and another based on documentation from a fifteen-month period. The three-month evaluation showed enhanced attorney practices, with the majority of the attorneys' time spent communicating with clients and preparing cases and a smaller portion of time spent in court.

The second evaluation found a substantially higher family reunification rate during the last four quarters of the pilot program as compared to the first quarter of the pilot. Such an increase in family reunification can reduce foster care placements and has the potential of significant cost savings for the state. Based on the results of the evaluation, the pilot program was refunded by the Legislature to ascertain the result of open and shut cases and to allow pilot courts to create court-wide continuance reductions. However, the funding was vetoed by Governor Locke. Because of the investment already made in the program and its importance to families and to the state, the OPD Advisory Committee decided to seek other funding sources, such as grants and agency savings, to maintain continuity for evaluation of the program during FY 2003.

At the direction of the Legislature, the agency implemented the Dependency and Termination Equal Justice Committee.

At the direction of the 2001 Legislature, a new judicial branch committee was established “to develop criteria for a statewide dependency and termination defense representation program.” In addition to developing this criteria for a statewide program, the Dependency and Termination Equal Justice Committee (DTEJ) is examining problems in dependency and termination proceedings that are barriers to equal justice for parents and that obstruct achievement of early permanency placement for children. The DTEJ Committee includes juvenile court judges and commissioners, legislators, parents’ attorneys, state agency and court representatives and other persons interested in these issues.

Three DTEJ subcommittees are examining issues including difficulties which parents may have in accessing court-ordered services, the efficient use of expert evaluators, and the effects of minimizing continuances in dependency and termination cases.

To review these issues, the Committee began developing five surveys, with the assistance of the Washington State Institute of Public Policy to send to all county- and state-funded providers to document what specific services are available; where services are provided; the waiting periods and screening processes involved; and when in the court process the services are being ordered. In addition, the surveys will evaluate the credentials and performance of expert service providers and will address chemical dependency service providers.

Members of the Dependency and Termination Equal Justice Committee are:

The Honorable Bobbe Bridge, Washington State Supreme Court (Chair); Ted Anderson, Skagit County Commissioner; The Honorable George N. Bowden, Snohomish County Superior Court; Michael Curtis, King County Juvenile Court; The Honorable James A. Doerty, King County Superior Court; Greg Dootson, DSHS Division of Children and Family Services; Patrick Dowd, Ombudsman, OFCO; The Honorable Jim Dunn, Washington State House of Representatives; Dan Erker, Pierce County Juvenile Court; Dan Fessler, Department of Assigned Counsel; Sieglinde Gassman, Washington State CASA; The Honorable James Hargrove, Washington State Senate; Steve Hassett, Assistant Attorney General; The Honorable Mary Margaret Haugen, Washington State Senate; Jann Hoppler, DSHS Children’s Administration; Marie Jamieson, Children’s Home Society; The Honorable Ruth Kagi, Washington State House of Representatives; The Honorable Kathy Lambert, House of Representatives; The Honorable Thomas P. Larkin, Pierce County Superior Court; Linda Lillevik, The Public Defender; Deb Lippold, Department of Assigned Counsel; Commissioner Lonna K. Malone, Benton-Franklin Superior Court; The Honorable George T. Mattson, King County Superior Court; Patrick Noone, King County Juvenile Court; Sharon Paradis, Benton-Franklin Juvenile Court; Commissioner Joseph Schneider, Benton-Franklin Superior Court; Jackie Shea, Shea and Brown; Janet Skreen,

Administrative Office of the Courts; Commissioner Charles R. Snyder, Whatcom County Superior Court; The Honorable Val Stevens, Washington State Senate; The Honorable Joseph A. Thibodeau, Snohomish County Superior Court; and The Honorable Joseph R. Zarelli, Washington State Senate.

The agency developed and submitted the 2001 Extraordinary Criminal Justice Costs Act prioritized list.

The Extraordinary Criminal Justice Costs Act, RCW 43.330.190, allows counties which have experienced high-cost aggravated murder cases to petition for state reimbursement. Under the Act, Washington State OPD annually implements the petition process and submits a prioritized list to the Legislature. Priority is based on the comparatively disproportionate fiscal impact on the individual county's budget.

In December 2001, petitions were filed by Clallam, Franklin, King, Kitsap, Klickitat, Pierce, Snohomish, Stevens, and Whatcom counties. Costs claimed in these petitions were audited and verified, including investigation, prosecution, indigent defense, jury impanelment, expert witnesses, interpreters, incarceration, and other adjudication expenses. The agency created a prioritized list in consultation with Washington Association of Prosecuting Attorneys and Washington Association of Sheriffs and Police Chiefs, and submitted the list to the Legislature, which granted partial reimbursement to two of the petitioning counties where the extraordinary costs had the highest budget impact for a state total of \$394,000.

In conjunction with the decision to propose the SPRC 2 death penalty representation rule amendment, the OPD Advisory Committee voted that a county's compliance with the rule will be a factor in prioritizing counties' petitions for reimbursement.

CONCLUSION

Washington State OPD continuously seeks ways to improve the quality of its services and more fully meet its joint mandates of implementing the constitutional guarantee of counsel and ensuring the effective and efficient delivery of indigent appellate services. During fiscal year 2002, OPD worked to improve death penalty representation by the initiation of a new rule adopted by the Supreme Court to require trial judges to appoint pre-qualified counsel in capital cases, the establishment of the Death Penalty Assistance Center, and the continued implementation of effective processes for appointment of appellate counsel.

OPD also met legislative requirements for reporting on the new DNA testing statute, continued work on a program to improve dependency and termination representation, and implemented a legislative mandate for a new committee, the Dependency and Termination

Equal Justice Committee, which began a wide variety of research to develop criteria for a statewide dependency and termination defense representation program.

At the same time, agency staff continued enhancements to the agency's indigent appellate attorney selection and evaluation processes, efficiently managed state funds provided for appellate indigent defense and other agency operations, and provided appropriate and timely services to the public, court reporters, attorneys, and the courts.